

University of Minnesota Law School Scholarship Repository

Minnesota Law Review

1944

Some Techincal Aspects of the Internal Revenue Statutes and Regulations

Ralph H. Dwan

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Dwan, Ralph H., "Some Techincal Aspects of the Internal Revenue Statutes and Regulations" (1944). *Minnesota Law Review*. 2133.
<https://scholarship.law.umn.edu/mlr/2133>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

SOME TECHNICAL ASPECTS OF THE INTERNAL REVENUE STATUTES AND REGULATIONS*

By RALPH H. DWAN**

ANY LAWYER worth his salt who has a tax problem will want to start with the statute itself. He will not be satisfied with any paraphrase of the statute appearing in an official or unofficial publication. Even when he has the text of the statute before him, he will sometimes, out of an abundance of caution, want to be sure that he has the true text established by law as such. Thus it may be worth while to consider where a lawyer finds the true text of the internal revenue statutes.

A brief survey of Federal statutes as a whole¹ may be helpful. A convenient starting point is the Revised Statutes, which were a complete revision of all Federal permanent public statutes enacted before December 1, 1873. That is the only general revision enacted as law in the history of the Federal statutes. The United States Code is only *prima facie* the law, and it is often necessary to check the United States Code against the Revised Statutes or against the later Statutes at Large. There have, however, been a few instances of revisions of particular parts of the Federal statutes, viz., the Criminal Code, the Judicial Code, and the Internal Revenue Code.

The Internal Revenue Code was enacted on February 10, 1939 and has been printed as Part 1 of Volume 53 of the Statutes at Large. The enacting statute specifically provides that the "Internal Revenue Title" is "enacted into law." Moreover, section 8 of the enacting statute provides

"Copies of this act printed at the Government Printing Office and bearing its imprint shall be conclusive evidence of the original Internal Revenue Code in the custody of the Secretary of State."

*The statements made in this article represent only the personal views of the author; they do not in any way reflect the official views of any government department or officer.

This article is, to some extent, a supplement to Dwan and Feidler, *The Federal Statutes—Their History and Use*, (1938) 22 MINNESOTA LAW REVIEW 1008.

**Assistant Chief Counsel, Bureau of Internal Revenue, Treasury Department of the United States, Washington, D. C.

¹For a fuller discussion, see Dwan and Feidler, *The Federal Statutes—Their History and Use*, (1938) 22 MINNESOTA LAW REVIEW 1008.

Since the enactment of the Internal Revenue Code, changes in the internal revenue laws generally have been in the form of amendments to particular sections of the Code or additions of new sections. Thus the Code as amended contains, with few exceptions, the internal revenue statutes now in effect. However, section 5 of the enacting statute provides that provisions of law in force on January 2, 1939 remain in force until the corresponding provisions of the Code take effect. The operation of that provision is illustrated by Section 1 of Chapter 1, the income tax chapter which provides

"The provisions of this chapter shall apply only to taxable years beginning after December 31, 1938. Income, war-profits, and excess-profits taxes for taxable years beginning prior to January 1, 1939, shall not be affected by the provisions of this chapter, but shall remain subject to the applicable provisions of the Revenue Act of 1938 and prior revenue acts, except as such provisions are modified by legislation enacted subsequent to the Revenue Act of 1938."

Since it is still necessary, at times, to ascertain the statutes applicable to taxable years prior to 1939, a few remarks may be made about those statutes. Beginning with the Revenue Act of 1918,² which also designates certain earlier acts as the Revenue Act of 1916 and the Revenue Act of 1917, it has been customary to designate in the statutes themselves certain acts as revenue acts of a particular year, e.g., the Revenue Act of 1921, the Revenue Act of 1924, the Revenue Act of 1926, etc.

That useful practice has continued since the enactment of the Code, thus the most recent general revenue act is designated as the "Revenue Act of 1943."³ However, certain revenue statutes of limited scope have been given other names, thus the so-called pay-as-you-go statute is designated as the "Current Tax Payment Act of 1943."⁴

The revenue acts prior to the Code were quite complete in themselves in that they usually repeated definitions and other provisions appearing in earlier revenue acts. Each revenue act applied only to certain designated periods or events. Those revenue acts, however did not purport to cover the whole field of internal revenue taxation. It was often necessary, as to particular matters, to examine the Revised Statutes, amendments thereto, and subsequent provisions in the Statutes at Large.

²40 Stat. at L. 1057, sec. 1403-1405.

³Public Law 235, 78th Cong., 2d Sess.

⁴Public Law 68, 78th Cong., 1st Sess.

Although, as we have seen, the Internal Revenue Code was enacted as law and not merely as *prima facie* the law, there is one qualification which should be borne in mind. Section 6 of the enacting statute provides

"The arrangement and classification of the several provisions of the Internal Revenue Title have been made for the purpose of a more convenient and orderly arrangement of the same, and, therefore, no inference, implication or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion thereof, nor shall any outline, analysis, cross reference, or descriptive matter relating to the contents of said Title be given any legal effect."

There has been considerable dispute about the propriety of using the title of a statute or the heading of a section in a statute as an aid to construction. Apparently the doubt arose out of the fact that the early legislative practice was to enact a statute without title or section headings which were subsequently added by the clerk or the printer.⁵ Since that practice no longer prevails, it would seem that such titles and headings should be available as an aid to construction where the body of the statute or section is ambiguous. In any event, the Supreme Court has so held.⁶

The section of the statute enacting the Internal Revenue Code, just quoted, apparently changes the rule with respect to section headings in the Code. That section, however, probably would have no effect with respect to a heading which was already in a revenue act before the Code was enacted.⁷ An interesting question arises with respect to new sections with appropriate headings added to the Code by subsequent revenue acts. It might be argued that since the new section becomes a part of the Code it is subject to the provisions of Section 6. On the other hand, Section 6 refers to arrangements and classifications which "*have* been made." Thus, it is arguable that Section 6 refers only to classifications and arrangements made at the time of the original enactment of the Code and not to the headings of sections added to the Code at a later date. In a recent case,⁸ the Tax Court of the United States relied upon the heading of a section of the Code added by the

⁵See 2 Sutherland, *Statutory Construction* (3rd ed., by Frank E. Horack, Jr., 1943), sections 4802 and 4903.

⁶*Knowlton v. Moore*, (1900) 178 U. S. 41, 65, 20 Sup. Ct. 747, 44 L. Ed. 969; *Maguire v. Commissioner*, (1941) 313 U. S. 1, 9, 61 Sup. Ct. 789, 85 L. Ed. 1149.

⁷That seems to be assumed, without discussion, in *Fawcett v. Commissioner*, (1944) 3 T. C. No. 37.

⁸*Keeble v. Commissioner*, (1943) 2 T. C. No. 148.

Revenue Act of 1939 without any reference to Section 6 of the Code.

In connection with this matter of section headings, it may be added that extensive use of such headings in internal revenue statutes seems to have started at a rather late date, i.e., with the Revenue Act of 1928,⁹ but has been continued in subsequent revenue acts.

After he has examined the text of the Internal Revenue statute, the lawyer normally will next consult the regulations promulgated by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, pursuant to statutory authority. Regulations differ considerably in form and purpose. A useful classification has been made by recent writers on the subject,¹⁰ including those who prepared the report of the Attorney General's Committee on Administrative Procedure,¹¹ viz., the distinction between "interpretative" regulations and "legislative" regulations.

The principal purpose of interpretative regulations is pedagogical, i.e., to explain and illustrate the operation of the statute. The method usually pursued is the sound pedagogical one of proceeding from the simple to the complex.

It is not a part of our legislative tradition to include illustrations in the statute itself, although recent revenue statutes have included tables, e.g., the wage bracket withholding tables in the Current Tax Payment Act of 1943.¹² Interestingly enough, one internal revenue statute, the Public Salary Tax Act of 1939¹³ expressly refers to the "application of the doctrines" in three named decisions of the United States Supreme Court. Illustrations do appear in Congressional Committee reports and are often carried into the regulations, but the regulations usually go further than the reports in explanation and illustration.

The draftsmen of the regulations must keep in mind the limit-

⁹45 Stat. at L. 791.

¹⁰Lee, *Legislative and Interpretive Regulations*, (1940) 29 Georgetown L. Journ. 1 (collecting the earlier literature on the subject at p. 2, n. 1). Alvord, *Treasury Regulations and the Wilshire Oil Case*, (1940) 40 Col. L. Rev. 252; Surrey, *The Scope and Effect of Treasury Regulations under the Income, Estate, and Gift Taxes*, (1940) 88 U. of Pa. L. Rev. 556; Griswold, *A Summary of the Regulations Problem*, (1941) 54 Harv. L. Rev. 398.

¹¹Final Report, (U. S. Govt. Printing Office, 1941) The report (at p. 100) uses the term "interpretative," but, instead of using the term "legislative," speaks of "legally binding regulations" and "statutory regulations."

¹²Public Law 68, 78th Cong., 1st Sess.

¹³53 Stat. at L. 574, 576, sec. 203.

tations which the courts have placed upon the use of Committee reports, debates, etc., as aids to construction, at least where the validity of the regulations may be questioned in court.¹⁴ However, where a proposed regulation favors the taxpayers and therefore will not be litigated, more latitude is properly recognized. An example may be found in Regulations 115 relating to the collection of income taxes at the source on wages, under the Current Tax Payment Act of 1943.¹⁵ The statute requires "every employee receiving wages"¹⁶ to furnish his employer with a withholding exemption certificate relating to his family status. Although the statute contains no express exceptions, the regulations state¹⁷ that no certificate is required from an individual under 16 years of age performing services in the distribution of newspapers unless such individual is paid wages in excess of the withholding exemption. That exception is entirely justified in view of the general purpose of the statute to use withholding as a collection device and in view of the desirability of simplifying administration.

The statute itself and its legislative history are not the only sources from which interpretative regulations may be derived. *Textile Mills Securities Corp. v. Commissioner of Internal Revenue*¹⁸ involved a regulation, expressly referred to by the Court as an "interpretative regulation," which provided that sums of money expended for lobbying purposes are not "ordinary and necessary expenses" deductible from the gross income of corporations. The Court pointed out that the words "ordinary and necessary" are not so clear and unambiguous as to leave no room for

¹⁴See Dwan and Feidler, *The Federal Statutes—Their History and Use*, (1938) 22 MINNESOTA LAW REVIEW 1008, 1027-29. Probably the best statement of the limitations by the Supreme Court is in a non-revenue case, *Wright v. Vinton Branch of Mountain Trust Bank*, (1937) 300 U. S. 440, 57 Sup. Ct. 556, 81 L. Ed. 736, in which Mr. Justice Brandeis stated (at p. 463-464, n. 8) "Where the meaning of legislation is doubtful or obscure, resort may be had in its interpretation to reports of Congressional committees which have considered the measure * * *; to exposition of the bill on the floor of Congress by those in charge of or sponsoring the legislation * * *; to comparison of successive drafts or amendments of the measure * * *; and to the debates in general in order to show common agreement on purpose as distinguished from interpretation of particular phraseology * * *"

¹⁵Public Law 68, 78th Cong., 1st Sess.

¹⁶I. R. C., sec. 1622(h), added by sec. 2 of the Current Tax Payment Act of 1943.

¹⁷At p. 44.

¹⁸(1941) 314 U. S. 326, 62 Sup. Ct. 272, 86 L. Ed. 249. Cf. *Commissioner of Internal Revenue v. Heininger*, (1943) 64 Sup. Ct. 249, in which the Court, in a somewhat similar case, pointed out that it did not "have the benefit of an interpretative departmental regulation," referring to the *Textile Mills Securities Corporation* case.

an "interpretative regulation." The Court then referred to the common law cases dealing with lobbying contracts and said that the general policy indicated by those cases may be considered in the promulgation of regulations.

As already indicated, regulations sometimes serve another function, viz., to settle points as to which the statute is ambiguous. The courts give great weight to the regulations under such circumstances,¹⁹ particularly when their promulgation was substantially contemporaneous with the enactment of the statute and they have had long continued operation.²⁰

Another factor often emphasized, and perhaps over-emphasized, by the courts is the reenactment of a statute without change after the promulgation of a regulation under the earlier statute. That question has arisen most frequently in connection with revenue acts because of the practice until recently to reenact large parts of the revenue statutes every few years. The profession was rather startled by the apparently extreme position taken in *Helvering v. R. J. Reynolds Tobacco Company*,²¹ in which the court seemed to say that Congress had approved the administrative construction and thereby given it the force of law, and further that the administrative officers were powerless to amend the regulation without a declaration by Congress. However, the old regulation had been long continued and uniform, and the specific question was whether

¹⁹A statement of the rule may be found in *Fawcus Machine Company v. United States*, (1931) 282 U. S. 375, 51 Sup. Ct. 144, 75 L. Ed. 397. That case involved a regulation construing the excess profits tax provisions of the Revenue Act of 1918. Speaking of those regulations, which were issued under a general statutory authority "to make all needful rules and regulations for the enforcement of the provisions of this Act," Mr. Justice Roberts said (page 378)

"They are valid unless unreasonable or inconsistent with the statute.
* * * They constitute contemporaneous construction by those charged with the administration of the act, are for that reason entitled to respectful consideration, and will not be overruled except for weighty reasons."

Among the numerous general provisions for regulations in the Internal Revenue Code are: I.R.C., sec. 62 (income tax) 3450 (manufacturers excise and import taxes), 3791(a) (all internal revenue taxes, with certain named exceptions). A useful provision is I.R.C., sec. 3791(b)

"Retroactivity of Regulations or Rulings.—The Secretary or the Commissioner with the approval of the Secretary, may prescribe the extent, if any, to which any ruling, regulation, or Treasury Decision, relating to the internal revenue laws, shall be applied without retroactive effect."

²⁰In *Magruder v. Washington, Baltimore & Annapolis Realty Corp.*, (1942) 316 U. S. 69, 62 Sup. Ct. 922, 86 L. Ed. 1278, the court, in sustaining the validity of a regulation, stated that the particular article of the regulations "is both a contemporary and a long standing administrative interpretation" and that such "interpretative regulations" are "appropriate aids" in eliminating "confusion and uncertainty."

²¹(1939) 306 U. S. 110, 59 Sup. Ct. 423, 83 L. Ed. 536.

the amendment to the regulation could be applied retroactively; the court left open the question whether the regulation could be amended even for the future. Within less than a year, the court clarified the situation considerably in *Helvering v. Wilshire Oil Company*.²² That case leaves little doubt that prospective regulations may be valid without further Congressional action even though the contrary earlier regulations have been followed by reenactment of the statute. This subject of reenactment has been illuminated by a number of law review articles.²³ At all events, reenactment in the revenue field has become of less importance since the enactment of the Internal Revenue Code in 1939, because reenactment of all or large parts of the Code has not taken place.

A recent tendency with respect to both statutes and regulations should be noted. The legislators and administrators have become increasingly aware of the importance of tax forms which have to be filled out by taxpayers. For that reason statutes and regulations are being framed to make such forms as simple and easily understood as possible. An example is Supplement T of Chapter 1 of the Internal Revenue Code, as amended, and the regulations promulgated thereunder, which have resulted in a short form (Form 1040A) for optional use by individuals having gross income from certain sources of less than \$3,000. The statute itself includes a detailed table showing the tax under varying circumstances.

Turning now to so-called legislative regulations, they are designed to carry out broad and general statutory directions. Probably the best example in the internal revenue regulations is to be found in the regulations on consolidated returns, authorized by Section 141 of the Internal Revenue Code, as amended. The statute provides that an affiliated group of corporations shall have the privilege of making consolidated income and excess-

²²(1939) 308 U. S. 90, 60 Sup. Ct. 18, 84 L. Ed. 101. Cf. *American Chicle Co. v. United States*, (1942) 316 U. S. 450, 62 Sup. 1114, 86 L. Ed. 1591. In this connection see I.R.C., sec. 3791(b), quoted in n. 19, supra.

²³Lee, *Legislative and Interpretive Regulations*, (1940) 29 *Georgetown L. Journ.* 1, 26-29; Alvord, *Treasury Regulations and the Wilshire Oil Case*, (1940) 40 *Col. L. Rev.* 252; Surrey, *The Scope and Effect of Treasury Regulations under the Income, Estate, and Gift Taxes*, (1940) 88 *U. of Pa. L. Rev.* 556; Paul, *Use and Abuse of Tax Regulations in Statutory Construction*, (1940) 49 *Yale L. Journ.* 660, republished, with some changes, in Paul, *Studies in Taxation*, Third Series, 420; Brown, *Regulations, Reenactment, and the Revenue Acts*, (1941) 54 *Harv. L. Rev.* 377, Griswold, *A Summary of the Regulations Problem* (1941), 54 *Harv. L. Rev.* 398 and 1323, Feller, *Addendum to the Regulations Problem*, (1941) 54 *Harv. L. Rev.* 1311.

profits tax returns in lieu of separate returns, subject, however, to consent to the regulations. The Commissioner, with the approval of the Secretary, is directed to prescribe regulations to conform to the following standard

"* * * that the tax liability of any affiliated group of corporations making consolidated income- and excess-profits tax returns and of each corporation in the group, both during and after the period of affiliation, may be returned, determined, computed, assessed, collected, and adjusted, in such manner as clearly to reflect the income- and excess-profits tax liability and the various factors necessary for the determination of such liability, and in order to prevent avoidance of such tax liability"

Under that rather general direction, elaborate regulations have been prescribed.²⁴ The constitutional theory of this delegation of power is discussed in the Senate Committee Report²⁵ on the similar provision in the bill which became the Revenue Act of 1928. The Committee stated

"* * * The committee believes it to be impracticable to attempt by legislation to prescribe the various detailed and complicated rules necessary to meet the many differing and complicated situations. Accordingly it has found it necessary to delegate power to the Commissioner to prescribe regulations legislative in character covering them. The standard prescribed by the section keeps the delegation from being a delegation of pure legislative power and is well within the rules established by the Supreme Court. * * * Furthermore, the section requires that all the corporations joining in the filing of a consolidated return must consent to the regulations prescribed prior to the date on which the return is filed."

The Supreme Court has considered very recently in *Commissioner of Internal Revenue v. Lane-Wells Co.*,²⁶ the effect of regu-

²⁴Regulations 104 and 110, as amended.

²⁵No. 960, 70th Cong., 1st Sess., reprinted in C. B. 1939-1, Part 2, 409, 419. That issue of the Cumulative Bulletin contains the Committee reports on the various Revenue Acts through the Revenue Act of 1938.

²⁶(1944) 64 Sup. Ct. 511. Compare the earlier decision in the famous case of *Boske v. Comingore*, (1900) 177 U. S. 459, 20 Sup. Ct. 701, 44 L. Ed. 846. That case involved regulations issued by the Secretary of the Treasury with respect to the disclosure of information contained in tax returns. It was held that a revenue officer, acting under the regulations, was immune from liability for contempt for refusal to obey a court order, specifically, he was held entitled to discharge by a Federal court upon habeas corpus from custody of a county sheriff. The regulations were issued under section 161 of the Revised Statutes, (U. S. C., Title V, sec. 22), which provides "The head of each department is authorized to prescribe regula-

lations promulgated under a similar statutory delegation. The applicable statute²⁷ required a personal holding company to "make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe." The regulations required a "separate return" on Form 1120H. Failure to comply with that requirement was held to prevent the statute of limitations from starting to run and to result in a penalty for failure to file, even though the taxpayer had filed the usual corporation income tax returns on Form 1120. The court stated

"* * * Taxpayer says that the information called for by Form 1120H is information that could have been called for by Form 1120. We assume so, but we do not see how the fact helps the taxpayer, for the Treasury was fully within the statute in requiring that information in a separate return.

"Congress has given discretion to the Commissioner to prescribe by regulation forms of returns and has made it the duty of the taxpayer to comply * * * The purpose is not alone to get tax information in some form but also to get it with such uniformity, completeness, and arrangement that the physical task of handling and verifying returns may be readily accomplished. For such purposes the regulation requiring two separate returns for these taxes was a reasonable and valid one * * *"

The above discussion indicates that there is a useful distinction between "interpretative" and "legislative" regulations. However, too much should not be expected of it; as in the case of most

tions, not inconsistent with law, for * * * the custody, use, and preservation of the records, papers, and property appertaining to it." In commenting upon the validity of the regulations Mr. Justice Harlan, speaking for the Court, said (page 470)

"In determining whether the regulations promulgated by him are consistent with law, we must apply the rule of decision which controls when an act of Congress is assailed as not being within the powers conferred upon it by the Constitution; that is to say, a regulation adopted under section 161 of the Revised Statutes should not be disregarded or annulled unless, in the judgment of the court, it is plainly and palpably inconsistent with law. Those who insist that such a regulation is invalid must make its invalidity so manifest that the court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the act of Congress."

²⁷Corresponding to the present I.R.C., sec. 54(a). The Court, in stating the statutory basis for the regulations, also referred to a general section of the statute (corresponding to the present I.R.C., sec. 62) authorizing all "needful rules and regulations for the enforcement of this title."

legal distinctions, the categories tend to run together.²⁸ Thus, a legislative regulation necessarily includes an interpretation of the statute under which it is issued, at least with respect to the scope of the authority conferred by the statute.

Returning to the matter of terminology, the term "interpretative" is a rather happy one, which has been used by the Supreme Court.²⁹ An alternative word is suggested by an opinion of the Supreme Court delivered by Mr. Justice Rutledge in *Merchants National Bank of Boston v Commissioner of Internal Revenue*.³⁰ He referred to certain Treasury regulations, which were interpretative in character, as "appropriate implementations" of a certain subsection of the Revenue Act of 1926. Thus one may speak of interpretative or implementing regulations. By the same token, perhaps one may speak of legislative or supplementing regulations. The word "supplementing" at least avoids the unpleasant implication of a delegation of legislative power

²⁸The nature of the regulations involved in the *Wilshire case*, supra n. 22, has been the subject of some difference of opinion. See Lee, *Legislative and Interpretive Regulations*, (1940) 29 Georgetown L. Journ. 1, at p. 28, n. 65 and p. 29, n. 66, Surrey, *The Scope and Effect of Treasury Regulations under the Income, Estate, and Gift Taxes*, (1940) 88 U. of Pa. L. Rev. 556, 572, Alvord, *Treasury Regulations and the Wilshire Oil case*, (1940) 40 Col. L. Rev. 252, 256-257, Griswold, *A Summary of the Regulations Problem*, (1941) 54 Harv. L. Rev. 398, 401, Feller, *Addendum to the Regulations Problem*, (1941) 54 Harv. L. Rev. 1311, 1320, n. 40.

²⁹In addition to the cases already referred to as using that term, see *Helvering v. R. J. Reynolds Tobacco Co.*, (1939) 306 U. S. 110, 114, 59 Sup. Ct. 423, 83 L. Ed. 536.

³⁰(1943) 320 U. S. 256, 64 Sup. Ct. 108.